

NTSB Order No. EA-3718

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of October, 1992

Respondent .

Docket SE-11220

The Administrator has filed an interlocutory appeal from decisions of Administrative Law Judges Fowler and Geraghty, issued on July 18, 1990 and September 11, 1990, respectively.¹ We grant the appeal and dismiss the petition for review, thus terminating this proceeding.²

²In doing so, we see no need, as the Administrator seeks, to vacate other, tangential orders issued by Law Judge Geraghty.

The import of the facts, rather than the facts themselves, is in dispute in this case. Respondent was advised on a number of occasions by an FAA doctor that his medical history disqualified him for any class of medical certificate, and that his certificate was considered invalid. He was invited to surrender it. Respondent was also advised that operations under the certificate would violate the Federal Aviation Regulations (FAR), specifically 14 C.F.R. 61.53.

Respondent, in turn, filed a petition for review, contending that this action constituted a final order by the Federal Air Surgeon. Whether it is or is not is the only issue before us, for if it is not, respondent does not contest the Administrator's claim that we have no jurisdiction.

We agree with the Administrator. The FAA letter attached to respondent's original petition for review specifically states that it "does not constitute, nor should it be construed as an order or demand for the return of your medical certificate." Contrary to respondent's characterization (Reply at 2), the FAA has not yet determined that respondent is not in compliance with the FAR.

Urging respondent to surrender his certificate is not, as a legal matter, equivalent to a formal order, appeal of which would invoke the Board's authority. Petition of Doe, 1 NTSB 1793 (1972). Indeed, the above language quoted from the letter to respondent appears in the letter at issue in Doe. In addition,

we see considerable merit in the Administrator's concern that respondent's theory would interfere with FAA investigations as well as prosecutorial discretion. See Administrator's Brief in Support of Interlocutory Appeal at 9-10. If the Administrator issues an order against respondent, respondent will have a full opportunity to prove his qualification. That respondent is aware of the FAA's contrary view does not permit him to obtain resolution prior to an agency order.

Respondent's citation to Barlow v. FAA, No. 86-1807 (10th Cir. December 23, 1986), is not dispositive of the matter at issue here. There, the court stated "we assume without deciding that the action taken by the agency . . . entitled petitioner to an administrative hearing...." Slip opinion at 1-2. The jurisdictional issue was thus passed over because the court had alternate and apparent grounds for dismissing petitioner's challenge to the agency action. Consequently, the assumption about jurisdiction was one of convenience and does not indicate any decision on the merits. Similarly, the initial decision in Administrator v. Falkner, 4 NTSB 1469 (1984), cited by the law judge, is not compelling in view of the Board's failure to address the issue directly, and its suggestion of disagreement.

It would appear obvious that the outcome in this case is dictated by the Board's earlier ruling in Doe. Nevertheless, in Doe, we criticized this same form letter's language because its contradictory phraseology will undoubtedly confuse some as to its

legal impact. It contains apparently straightforward legal conclusions regarding consequences of continued flight, with a request for "voluntary" return of the applicant's certificate -- but, by indicating that the letter is not an order of the Administrator, it makes any review of these conclusions impossible outside of the context of continued flight. Although we recognize the FAA's interest in surrender of certificates without the need of a formal proceeding, we would again urge that the language in the letter make clear that it contains only the informed opinion of the signatory medical officer lest the entire process be deemed administrative action evading review.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's interlocutory appeal is granted; and
2. This proceeding is discontinued and the petition for review dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.